

Gender Stereotypes, Picket Line Violence, and the "Law" of Strike Misconduct Cases

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I. INTRODUCTION

This article explores the role of gender stereotypes in the construction of the legal boundaries of acceptable strike behavior for individual workers. Strikes and their accompanying picket lines are a prominent feature of American labor relations and the subculture of unions. As a part of the economic "weaponry" of contract negotiations and union organizing, strikes and pickets are a legitimate — legally protected — form of collective worker activity. But, there are also a number of legal constraints on strikes and pickets. One of these constraints arises from the 1947 Taft-Hartley Amendments to the 1935 Wagner Act. Section 8(b)(1)(A) of the National Labor Relations Act (NLRA) permits an employer to obtain remedies by filing an unfair labor practice charge against a union which engages in violence during a strike.¹ There must be evidence, however, that the union had

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1. "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in section 157 [§ 7]." Labor Management Relations Act § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1988). Section 7 reads:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted

responsibility for the violence according to principles of agency—that the union directed, authorized, or condoned the violent behavior of its members. Employers can also obtain injunctions limiting the number of pickets in certain situations. Criminal law and sometimes tort law are also invoked by employers and victims of violence in labor disputes.

Perhaps the most effective employer "remedy" against strike violence does not, at the outset, involve any legal process at all. The employer possesses freedom to suspend, discharge, or refuse to reinstate an employee who engages in so-called strike misconduct. This freedom to discipline employees is not absolute since the employee has two formal mechanisms to challenge the employer's decision. The first is through the grievance and arbitration procedures provided either under a collective bargaining agreement or a strike settlement agreement. The second is through the unfair labor practice procedures of the National Labor Relations Board (NLRB or the Board) which prohibit employer interference with an employee's right to strike and picket.²

There are important ways in which these two fora for dispute resolution differ. Both involve hearings with witnesses, but arbitration is informal, contextual, and private. The governing "law" includes the contract between the employer and the union, as well as the unwritten practices of the industry. The decisions of the arbitrator are binding and generally unreviewable. Arbitration is relatively quick, and thus the resolution of the dispute, for good or ill, is soon accomplished. The

activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) [§ 8(a)(3)] of this title.

Labor Management Relations Act § 7, 29 U.S.C. § 157 (1988).

The Supreme Court has held that "§ 8(b)(1)(A) is a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof—conduct involving more than the general pressures upon persons employed by the affected employers implicit in economic strikes." *NLRB v. Local 639, International Brotherhood of Teamsters*, 362 U.S. 274, 290 (1960).

Thieblot and Haggard have argued that the NLRB and the courts have adopted "a somewhat passive if not implicitly tolerant attitude toward the problem of union violence." ARMAND J. THIEBLOT, JR. & THOMAS R. HAGGARD, *UNION VIOLENCE: THE RECORD AND THE RESPONSE BY COURTS, LEGISLATURES, AND THE NLRB* 365 (1983). See generally *id.* at 365-462 (discussing labor union violence as an unfair labor practice).

2. Section 8(a)(1) of the National Labor Relations Act reads: "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 [§ 7] of this title." 29 U.S.C. § 158(a)(1) (1988).

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judicial and administrative procedures of the NLRB, on the other hand, are formal and public. The substantive law applied is the federal labor law as construed by the Board and the federal appellate courts. Evidentiary issues are resolved under the federal rules of evidence.³ The decisions of the administrative law judge are not self-enforcing and are reviewable by the National Labor Relations Board.⁴ If the employer fails to comply with a Board order, the Board must petition a federal court of appeals for an enforceable order.⁵ The consequence of the lengthy administrative hearing and review procedures under the NLRA is that employees seeking reinstatement because of employer unfair labor practices may have to wait years to obtain remedial relief.⁶

Employees must traverse this legal terrain to regain their jobs when discharged for strike misconduct. Some of the questions for my research are: What role does gender play in the way these disputes are defined and resolved? Do the facts of the cases reveal gender-linked forms of violence and militancy? Have the descriptions of men's and women's behavior changed over time? Are there implicit expectations that women in "male" jobs—such as mining, manufacturing, and construction—will be more or less violent than women in "female" jobs—such as health care and retail sales? Are behaviors of employees described in language that is gender stereotyped? Do the decision-makers

3. Labor Management Relations Act § 10(b), 29 U.S.C. § 160(b) (1988).

4. "Any person aggrieved by a final order of the Board" may obtain appellate review from a federal court of appeals. Labor Management Relations Act § 10(f), 29 U.S.C. § 160(f) (1988).

5. An aggrieved party may even petition the Supreme Court for certiorari, though this may only be a device to buy time since the Supreme Court has reviewed only one case directly dealing with the issue of strike misconduct since the National Labor Relations Act was passed in 1935. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

6. For example, in one Board case in my study it took over ten years to obtain a final enforceable order of reinstatement for the employees. The Champ Corporation strike began in 1979, and the administrative law judge hearing on the strike misconduct discharges was concluded in 1981. The case was finally resolved when the Supreme Court denied certiorari in 1991. *Champ Corp.*, 291 N.L.R.B. 803 (1988), *enforced*, 913 F.2d 639 (9th Cir. 1990), *amended & reh'g denied*, 933 F.2d 688, *cert. denied*, 112 S.Ct. 416 (1991). The lengthy delays in obtaining relief through Board processes has come under increasing attack in recent years. See generally Dianne Avery, *Federal Labor Rights and Access to Private Property: The NLRB and the Right to Exclude*, 11 INDUS. REL. L.J. 145, 161-68 (1989) (discussing Board delay in access disputes brought under § 8(a)(1) of the NLRA); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1796-97 (1983) (discussing Board delay in discriminatory discharge cases under §§ 8(a)(1) and 8(a)(3) of the NLRA).

exhibit chivalry or paternalism toward female strikers?⁷ Are women punished more than men or differently from men for violation of norms of appropriate female behavior? How is the "good woman/evil woman" dichotomy revealed in the way strikers or victims of strike violence are treated?⁸ To what extent are assumptions about male and female biological and psychological traits used to explain strike violence, or to justify severity or leniency in its punishment? Are sociological theories of deviance and social control implicit in the way some disputes are characterized and transformed by the decision-makers? What is the relationship between gender stereotypes and the way rules and legal doctrines are shaped? Conversely, do the rules and doctrines ignore or highlight gender differences or gender stereotypes, and what difference might this make in outcomes?

For purposes of this article, the methodology has been to read and qualitatively analyze the arbitration and NLRB decisions from 1947 to the present which deal with individual employee misconduct.⁹ For the most part, cases dealing with union-instigated violence have been deliberately excluded.¹⁰ By definition such violence is an instrumental response of the organization to the strike situation. The cases of individual employee discipline, however, focus on personal "guilt" or liability for strike misconduct. In theory, at least, the union has had no responsibility for an

7. See Brian Bemmels, *The Effect of Grievants' Gender on Arbitrators' Decisions*, 41 INDUS. & LAB. REL. REV. 251, 254 (1988).

8. *Id.* at 254.

9. My review of published arbitration decisions from 1947 through 1991, and NLRB cases from 1971 through 1991, is completed. I am in the process of reviewing the NLRB cases from 1947 to 1971. Since my source of cases only includes strikers who are employees, my study does not deal with family members (which would include many women) who join the picket line in support of the strike. In a few instances, however, strikers have been disciplined for the picket line behavior of their family members.

10. The body of cases which deal with labor union violence as an unfair labor practice under NLRA § 8(b)(1)(A) offer an additional source of case studies for future research on gender stereotypes. For example, a trial examiner commented that "it may seem unrealistic to require that a picket line shed the sweetness and charm of Vassar's daisy chain or that it maintain the dignity of the procession of cardinals (although so close a formation would not be tolerated), but that appears to be the trend of Board decisions." Local 235, Lithographers Union (Henry Wurst, Inc.), 187 N.L.R.B. 490, 495 (1970), as quoted in THIEBLOT & HAGGARD, *supra* note 1, at 377.

While employees engaged in conduct prohibited under § 8(b)(1)(A) may also be discharged, the posture of these cases (brought by the employer filing an unfair labor practice charge for the purpose of obtaining a Board remedy against the union) is quite different from the § 8(a)(1) cases included in my study (which are initiated by the union or employee filing an unfair labor practice charge for the purpose of obtaining a Board remedy—generally backpay and/or reinstatement—against the employer).

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employee's misconduct. To use a gendered term, the guilty employee is a "rogue" — someone who has violated the union's norms of strike conduct as well as the employer's. Thus, in appropriate cases, discharge — the "capital punishment" of the employment relationship — is a penalty which unions are willing to accept for their members in the interests of obtaining a settlement of the strike. It is also a penalty which is central to an understanding of federal policy shaping and limiting the right to strike and picket.

In order to place the appropriate cases within a social and historical context, and to provide a theoretical framework for the questions and conclusions posed, this article relies heavily upon scholarship in labor history and sociology, particularly recent feminist critiques and perspectives within those larger fields. A new awareness of the pervasiveness of women's militancy in the history of American labor strikes has emerged from the feminist scholarship of the last two decades.¹¹ This research counters stereotyped images of women as passive and weak or as uncontrolled and wild. Some research by historians, sociologists, and anthropologists has indicated that, while women may have been more active and aggressive in union activity than previously believed, they also may have developed uniquely "feminine" forms and methods of protest that are either quite different from the "masculine" paradigm of a militant and belligerent picket line or that transform the picket line, and collective labor activity generally, into different forms of social and cultural protest.¹² This paper's reading and

11. The revisionist scholarship by feminist labor historians is beginning to influence the work of legal academics studying the relationship of gender to labor law. See, e.g., Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1205-06 (1991); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

12. See generally MARY H. BLEWETT, *MEN, WOMEN, AND WORK: CLASS, GENDER, AND PROTEST IN THE NEW ENGLAND SHOE INDUSTRY, 1780-1910* (1988); WORK ENGENDERED: TOWARD A NEW HISTORY OF AMERICAN LABOR (Ava Baron ed., 1991); PATRICIA COOPER, *ONCE A CIGAR MAKER: MEN, WOMEN, AND WORK CULTURE IN AMERICAN CIGAR FACTORIES, 1900-1919* (1987); RICK FANTASIA, *CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS* (1988); ELIZABETH FAUE, *COMMUNITY OF SUFFERING AND STRUGGLE: WOMEN, MEN, AND THE LABOR MOVEMENT IN MINNEAPOLIS, 1915-1945* (1991); NANCY F. GABIN, *FEMINISM IN THE LABOR MOVEMENT: WOMEN AND THE UNITED AUTO WORKERS, 1935-1975* (1990); MAURINE W. GREENWALD, *WOMEN, WAR, AND WORK: THE IMPACT OF WORLD WAR I ON WOMEN WORKERS IN THE UNITED STATES* (1980); ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* (1982); BARBARA KINGSOLVER, *HOLDING THE LINE: WOMEN IN THE GREAT ARIZONA MINE STRIKE OF 1983* (1989); RUTH MILKMAN, *GENDER AT WORK: THE DYNAMICS OF JOB SEGREGATION BY SEX DURING WORLD WAR II* (1987); WOMEN, WORK AND PROTEST: A CENTURY OF U.S.

retelling of the strike misconduct cases should add another set of stories about men and women and their strike behavior to this particular body of research.

II. ASSUMPTIONS ABOUT GENDER AND PICKET LINE VIOLENCE: THE HISTORICAL CONTEXT

A study of gender stereotypes in arbitration and Board decisions about picket line violence must necessarily begin with a brief discussion of several aspects of American labor history. The strike misconduct cases from the post-World War II period to the present are linked in several important ways to social and cultural relations and ideologies that existed in the colonial era and the early republic and have persisted through the emergence of the modern industrial state to the postmodern era. These social and cultural links include the occupational segregation of work according to sex, women's inferior roles within the traditional hierarchical ordering of both the workplace and unions, the ideology of separate spheres which relegates women to the private domestic realm and inhibits their participation in the public domain, and the shared assumptions that create gender identity by marking the boundaries of appropriate masculine and feminine behavior. Feminist historians of labor and the family have begun the process of revealing both the role of women and the relevance of gender as a social construct in the unfolding of the stories of American workers and their families.¹³

Early in the twentieth century, women workers who picketed were considered an aberrant phenomenon that seemed to defy experience, as well as traditional social and cultural norms. "Labor historians have often subsumed women and children under the category of 'worker,'

WOMEN'S LABOR HISTORY (Ruth Milkman ed. 1985); PERSPECTIVES ON AMERICAN LABOR HISTORY: THE PROBLEMS OF SYNTHESIS (J. Carroll Moody & Alice Kessler-Harris eds., 1989); KAREN BRODKIN SACKS, CARING BY THE HOUR: WOMEN, WORK, AND ORGANIZING AT DUKE MEDICAL CENTER (1988); Linda Frankel, *"Jesus Leads Us, Cooper Needs Us, the Union Feeds Us": The 1958 Harrier-Henderson Textile Strike*, in HANGING BY A THREAD: SOCIAL CHANGE IN SOUTHERN TEXTILES (Jeffrey Leiter et al. eds., 1991); Jacquelyn Dowd Hall, *Disorderly Women: Gender and Labor Militancy in the Appalachian South*, 73 J. AM. HIST. 354 (1986); Kate Purcell, *Militancy and Acquiescence Among Women Workers*, in WOMEN IN THE PUBLIC SPHERE (Janet Siltanen & Michele Stanworth eds., 1984).

13. See, e.g., BLEWETT and Hall, *supra* note 12; SHEILA M. ROTHMAN, WOMAN'S PROPER PLACE (1978); CHRISTINE STANSELL, CITY OF WOMEN: SEX AND CLASS IN NEW YORK, 1789-1860 (1986).

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writing about the working class as if it consisted only of adult men."¹⁴ In fact, despite their participation in numerous labor protests, women rarely appeared in the early reported federal cases of labor picketing.¹⁵ Early judicial assumptions about the potential for violence in labor picketing thus may have been attributable, in part, to stereotypical notions about male aggression and female passivity.¹⁶ The image of the aggressive male picketer conceals the complex roles that women historically have played in labor picketing. From the post-Civil War era through the Progressive era, many women were involved in strikes, sometimes as leaders, despite overt hostility from most labor unions.¹⁷ Through the 1920s and 1930s, the labor activism and picket line militancy of women provoked considerable public attention and created an intractable dilemma. Historian Jacquelyn Dowd Hall has observed that:

Since, presumably, only extraordinary circumstances call forth feminine aggression, women's assaults against persons and property constitute a powerful witness against injustice. At the same time, since women are considered less rational and taken less seriously than men, they may meet less resistance and be punished less seriously for their crimes.¹⁸

Women's behavior on the picket line, then, even when manifested in the same physical forms as male behavior, may be perceived to have different content and different consequences. Female aggression and violent activity may be trivialized or magnified. The legitimacy of women's militancy is even more suspect when women exhibit anger and aggression in ways that are peculiarly feminine and sisterly, through dress,

14. Jacquelyn Dowd Hall, *Private Eyes, Public Women: Images of Class and Sex in the Urban South, Atlanta, Georgia, 1913-1915*, in *WORK ENGENDERED*, *supra* note 12, at 243, 266.

15. Felix Frankfurter and Nathan Greene cataloged 118 reported federal labor injunction cases for the period 1901 to 1927. From the names of the plaintiffs and defendants in these cases, and the traditional sex-segregation of certain occupations, it is apparent that the workers were predominantly male. There were mine workers, stone cutters, painters, carpenters, teamsters, tailors, longshoremen, machinists, iron molders, and railway employees. There is one 1925 case dealing with a waitresses' union. FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION*, Appendix I (1930).

16. For other explanations of judicial assumptions about labor violence around the turn of the century, see generally Dianne Avery, *Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1894-1921*, 37 *BUFFALO L. REV.* 1 (1988/89).

17. See, e.g., NANCY WOLOCH, *WOMEN AND THE AMERICAN EXPERIENCE* 240-45 (1984).

18. Hall, *supra* note 12, at 374.

language, and song. The risk for a woman labor picketer in behaving in an aggressive but "feminine" manner is that feminism, femininity, and sexuality are confused. Such a woman places her own moral character in question. Hall observed that:

There is nothing extraordinary about this association between sexual misbehavior and women's labor militancy. Since strikers are often young single women who violate gender conventions by invading public space customarily reserved for men (and sometimes frequented by prostitutes)—and since female aggressiveness stirs up fear of women's sexual power—opponents have often undercut union organizing drives by insinuations of prostitution or promiscuity. Fearing guilt by association, "respectable" women stay away.¹⁹

Cultural stereotypes about women have historically served to constrain their public behavior into patterns which are determined to be appropriate by a male-dominated society. Over the last decade, there has been a resurgence of union organization in occupations which are predominantly female, such as nurses, teachers, office workers, flight attendants, and government workers.²⁰ In support of their efforts to organize new unions and negotiate contracts, women have increasingly participated in picketing, particularly in the health care industry and among clerical workers on college campuses. Women have made only nominal gains in their representation in traditional blue-collar male occupations which have a long history of unionization — such as the skilled trades in construction and manufacturing.²¹ But they have also become more

19. *Id.* at 375.

20. See Crain, *supra* note 11, at 1157 n.9. Crain reports that "only thirteen percent of female workers, as compared with twenty percent of male workers, were union members in 1989." *Id.* at 1157.

21. "Among all male-dominated occupations, women's representation increased more rapidly between 1972 and 1981 than during the 1960s. . . . [However] [m]ale craft, operative, and laborer occupations remained highly segregated . . . ; women's representation did not increase significantly in these occupations through 1981." WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB 28-29 (Barbara F. Reskin & Heidi I. Hartmann eds., 1986).

"Women have been conspicuously unsuccessful in acquiring a substantially larger share of the skilled craft jobs." The Bureau of Labor Statistics reported in 1981 that "[f]ewer than 2 percent of carpenters, electricians, auto mechanics, pipefitters or heavy equipment mechanics were women in 1980." KAY DEAUX & JOSEPH C. ULLMAN, WOMEN OF STEEL: FEMALE BLUE-COLLAR WORKERS IN THE BASIC STEEL INDUSTRY 16, 149 (1983).

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active in attempting to break down the barriers to their entry to the unionized skilled trades.²²

It should come as no surprise today that women sometimes engage in aggressive and hostile acts of violence and intimidation on the picket line, acts that have traditionally come to be expected from their male counterparts in the blue-collar occupations. Nevertheless, in many arbitration and Board decisions women continue to be judged against standards of "appropriate" female decorum, and thus they may pay dearly for aggressive acts and rough language which in men would be characterized as "a trivial rough incident" or "a moment of animal exuberance."²³

III. STRIKE MISCONDUCT CASES: AN ANALYSIS OF GENDER AND "LAW"

Assumptions about gender appear in many guises in arbitration and Board cases. While there are many cases in which gender is not explicitly addressed, gender assumptions form a backdrop against which the decision-makers test their understandings of the stories they hear. The gender identity of the parties at arbitration or Board hearings is always apparent to the decision-maker and can almost always be determined from reading the decision.²⁴ The cases have yielded subtle clues to the way

22. In recent years, women in the skilled trades have engaged in community organizing, initiated federal litigation under anti-discrimination laws, organized local support groups, started a nation-wide organization, and begun publication of a magazine and essays about their common interests and problems. See *HARD-HATTED WOMEN: STORIES OF STRUGGLE AND SUCCESS IN THE TRADES 8-9* (Molly Martin ed., 1988). Feminist legal scholars have also contributed to the reconceptualization of the legal strategies required to achieve sexual equality in the skilled trades. See, e.g., Sylvia A. Law, "Girls Can't Be Plumbers"—Affirmative Action for Women in Construction: Beyond Goals and Quotas, 24 HARV. C.R.-C.L. L. REV. 45 (1989).

23. These phrases were first used by Justice Frankfurter in the labor case of *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc.*: "And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force." 312 U.S. 287, 293 (1941). The "animal exuberance" term has since become widely used in Board and arbitration decisions dealing with strike misconduct. See *infra* text accompanying notes 73-78.

24. In my study, there have been only a few decisions where I have been unable to determine whether the grievant or complainant was male or female. Often the gender is apparent because of the use of full names of parties and witnesses. Arbitration decisions are often published with only the initials of the parties. In these cases, gender can usually be determined from the use of gendered pronouns in the decisions. The few cases where I have been unable to identify the gender of the parties are either (1) arbitration decisions which dealt with the misconduct of a group of employees who were not identified or discussed

gender may influence the manner in which the arbitrators and judges perceive problems and transform the disputes through a cultural lens.

This paper will focus on the role of gender stereotypes in the resolution of strike misconduct cases by addressing the following questions: (1) What do men and women do? (2) How is their conduct described? (3) How are "harm" and "deviance" defined? (4) How is truth determined? (5) What are the standards of conduct?

A. What Do Men Do? What Do Women Do?

The Sameness/Difference Debate.

The question whether men and women exhibit the same or different behavior on the picket line would generally be asked in the following way: Do women behave the same as men? Phrasing the question this way assumes that men's behavior is the standard against which women must be judged. It also assumes that when women behave in ways that are culturally defined as masculine, they are behaving "like men" and are "masculinized." The preliminary results of this author's study indicate that in the reported cases both men and women engage in a wide range of behaviors during a strike — both on and off the picket line. Many of these behaviors can be culturally typed as masculine or feminine — but many cannot. If anything can be safely said, it is that these cases indicate that gender identity is a poor predictor of picket line behavior of individuals.²⁵

For a variety of social and historical reasons, however, the strike — and picketing — are widely perceived as masculine in character and part of the world of men. A "picket" in the context of labor relations is "a person or persons stationed outside a place of employment, usually during a strike, to express grievance or protest and discourage entry by nonstriking employees or customers."²⁶ Well into the twentieth century, the public nature of a picket line marked it as a uniquely male institution. The convention (though not the reality) was that "proper" women simply did not inhabit public spaces or engage in public protests. The term "picket" also has a military definition: "A detachment of one or more soldiers advanced or held in readiness to give warning of enemy

individually or (2) arbitration decisions which used initials to identify the grievant and never used a gendered pronoun to refer to that person.

25. I must limit this claim to my database of published arbitration and Board decisions. While these cases are not "representative," they form the texts — or canons — which guide arbitrators and judges in their decisionmaking.

26. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 991 (1969).

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approach."²⁷ The military connotations of the union picket line are evident in its formation and structure. Generally unions will assign leadership roles in organizing and maintaining the picket line to "captains" and "lieutenants." The strike is often referred to as an economic "weapon" and as part of the legalized "warfare" between employers and employees.

In law, as well as in popular culture, the strike has been depicted as a domain where the norms of behavior are defined by the culture of the working man, rather than by the culture of the employer or of women's separate sphere. While class assumptions quite clearly underlie the way many courts have treated the picket line,²⁸ gender assumptions are linked to class. The paradigmatic striker is the working-class male. The strike and picket line become a place where such "blue-collar" men exhibit their true natures, unrestrained by either the authority structures and discipline found within the workplace or the domestic influences of the hearth. Many judges and arbitrators have long acknowledged (and sometimes deplored) a double standard of behavior which tolerates conduct and language during strikes that would be speedily punished within the workplace. For example, Justice Frankfurter observed that it would be wrong to assume that "all actions" which constitute "just cause" for discharge "in the absence of a labor controversy" are the same as actions which justify discharge during a strike.²⁹ A single standard of conduct, he argued, "would disregard the rough and tumble of strikes, in the course of which loose and even reckless language is properly discounted."³⁰

Thus, to the extent that there is a shared understanding of strikes and picket lines as manifestations of male culture, women seem anomalous when they participate in such collective activity. Arbitrators and judges continue to define strikes and picket lines in gendered terms — in opposition to what they perceive as "female" culture. For example, in 1971 an arbitrator commented that "[s]trikes are not garden parties;"³¹ in 1986 an administrative law judge observed that "[i]t has long been held that the picket line is not a 'Sunday School picnic.'"³² The consequences of these cultural constructs are manifold: expectations of gender-

27. *Id.*

28. See generally Avery, *supra* note 16.

29. *NLRB v. Local 1229, IBEW (Jefferson Standard)*, 346 U.S. 464, 480 (1953) (Frankfurter, J., dissenting).

30. *Id.*

31. Chemineer, 71-2 ARB (CCH) ¶ 8554 (Bernstein, Arb.).

32. *Virginia Holding Corp. (Hotel Roanoke)*, 293 N.L.R.B. 182 (1989).

appropriate behavior may limit forms of strike behavior for both women and men. Assumptions about gender roles may shape both the employer's initial decision to discipline women and men for their strike conduct (or misconduct) and the arbitrator's or judge's reexamination of the validity of that decision.

This article addresses the question of what these cases tell us about how the decision-makers characterize the behavior of women and men as the same, and how they characterize the behavior of women differently. Also, have the descriptions of strike behavior changed since the late 1940s? Several preliminary conclusions can be summarized as follows: First, in the cases studied, men far outnumbered women as grievants and complainants.³³ There may be many explanations for this disparity, including disparate representation of men and women in unionized workplaces which are likely to strike, the greater likelihood that men will engage in violent acts,³⁴ differences in employer discipline of men and women for strike misconduct,³⁵ and greater likelihood that men will dispute employer discipline through arbitration and Board proceedings.³⁶ Women not only appear as parties in these cases far less

33. For example, 25 relevant arbitration decisions published in the Labor Arbitration Reports between 1946 and 1956 dealt with 113 employees, 27 of whom were women. This is a ratio of about four to one for this ten-year period.

34. This assumption receives much support in social science theories of aggression and in studies of patterns of crime, as well as in popularized versions of this literature. For the latter, see MYRIAM MIEDIAN, *BOYS WILL BE BOYS: BREAKING THE LINK BETWEEN MASCULINITY AND VIOLENCE* (1991). From her interviews and extensive survey of the literature, Miedian, a journalist, concludes that "the potential for violence appears to be greater in males." *Id.* at 73. I am grateful to Mark Barenberg for bringing this book to my attention.

Research and popular bio-social theories about the inherently aggressive nature of males have been perceptively challenged by sociologists and biologists. See, e.g., CYNTHIA FUCHS EPSTEIN, *DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER* 59 (1988) ("In reality a wide range of behavior is exhibited in daily life by each sex. . . . [M]any men are passive and many women are aggressive."); ANNE FAUSTO-STERLING, *MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT WOMEN AND MEN* 207 (1985) (attacking the "evidence" of scientific studies of gender differences with the "contention . . . that there is no such thing as apolitical science.").

35. Note, however, that role theory would predict that women would be more likely to be disciplined for violation of workplace norms (presumably including norms for strike behavior) than men, particularly when they hold traditional male jobs. See, e.g., Laurie Larwood et al., *Sex Differences in Response to Simulated Employee Discipline Cases*, 32 *PERSONNEL PSYCHOL.* 539 (1979).

36. From their research on workplace jurisprudence, sociologists Patricia A. Gwartney-Gibbs and Denise H. Lach conclude that:

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frequently than men, they also rarely use "male" weapons such as knives, guns, rifles, or explosives. Nor do they engage in boxing or fist fights (though they sometimes use their fists). These differences reflect the different training that males and females traditionally receive in our society based on gender identity.³⁷ But the behavior of the men and women in these cases is far more alike than it is different. Both men and women strikers kick, push, shove, and throw objects such as rocks, bricks, and food (particularly eggs). They both use sticks or picket signs as crude weapons to assault or threaten others (although men may be slightly more likely to appear on the picket line with bats or chains). They both use foul and vulgar language — including racial and sexual epithets — to taunt their opponents. They are also both arrested when the police are called in to deal with strike violence, although relatively few cases are fully prosecuted.

The fact that the number of men who are disciplined for strike misconduct is far greater than the number of women, and that women generally do not engage in the most extreme forms of violence during a

[W]omen workers are often discouraged by the gatekeepers of dispute resolution forums within unions and firms; and . . . are more likely to transfer jobs to escape disputes, while men are more likely to employ formal dispute resolution mechanisms. These differences in workplace dispute resolution appear to be rooted in the social organization of work, particularly occupational sex segregation, as much as in gender roles.

Patricia A. Gwartney-Gibbs & Denise H. Lach, *Workplace Dispute Resolution and Gender Inequality*, 7 NEGOTIATION J. 187, 198 (1991).

37. This differential socialization has begun to change for some adult women. For example, beginning in the 1970s, some women, prompted by the "women's liberation movement," trained in judo and other martial arts for purposes of self-defense as well as self-realization. See THE BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, *OUR BODIES, OURSELVES: A BOOK BY AND FOR WOMEN* 94-97 (1971, 1973). Women body builders, boxers, and "lady wrestlers" are a more recent phenomenon, partly promoted by the media, especially televised competitions. For example, in April 1992, the Showtime network featured Kathy Long, "the undisputed women's featherweight world kick-boxing champion," in its "first kick boxing show." Davis Miller, *The Queen of Swift Kicks*, SPORTS ILLUSTRATED, June 15, 1992. "Women now make up approximately 10 percent of the United States military — a 500 percent increase in the number of women on active duty since 1972." CHRISTINE L. WILLIAMS, *GENDER DIFFERENCES AT WORK: WOMEN AND MEN IN NONTRADITIONAL OCCUPATIONS* 45 (1989). They nevertheless continue to be excluded from combat positions, a controversial and, in the wake of Operation Desert Storm, hotly debated, policy. See Special Report, *Our Women in the Desert: Sharing the Duty—and Danger—in a "Mom's War,"* NEWSWEEK, September 10, 1990, at 22. Gender differences in the socialization of children persist, although some educators and parents have recently been able to break down stereotypes. See Laura Shapiro, *Guns and Dolls*, NEWSWEEK, May 28, 1990, at 56.

strike (involving weapons or explosives) is paralleled in the criminological literature on gender differences in violent crimes.³⁸ It is with some caution, however, that I compare strike misconduct to criminal conduct. While it is true that some strike misconduct is properly seen as criminal or tortious — assault, battery, vandalism, trespass, harassment — the vast majority of employees disciplined for strike misconduct are not "criminals" as that word is generally understood. Strikers are employees engaged in a legally recognized form of protest against their employer. When conduct on or around the picket line crosses the boundary from legitimate protest and persuasion to illegitimate violence and coercion is not always easy to determine, as the many conflicting cases demonstrate.

But, employees who cross the boundary between acceptable and intolerable conduct are only temporarily "deviant." They almost always expect to resume their jobs at the end of the strike, and in that sense they never perceive themselves as being totally outside the employment relationship. Their primary identity is as employees, certainly not as criminals or outsiders. Nevertheless, employees arrested for strike misconduct may find themselves labeled as "criminals" by their employers, even if they are not prosecuted or found guilty of any crime. The label may justify discharge without any further independent inquiry. Thus, to the extent that gender assumptions contribute to differential treatment of men and women under the criminal justice system, these differences may be replicated and magnified in the workplace justice of employers, as well as third-party decision-makers.

Does the fact that women often behave the same as men on the picket line mean that these women have been "masculinized" by the socialization of the strike, or by "women's liberation," or by their experiences in nontraditional jobs?³⁹ The newly emerging historical

38. For example, studies have shown that "females are far less violent criminals than males," and "[v]iolence is not nearly as prevalent in women's prisons as in male institutions" CORAMAE RICHEY MANN, *FEMALE CRIME AND DELINQUENCY* 15, 221 (1984). However, some criminologists have challenged the "popular myth that women have been committing crimes of violence at a much higher rate in recent years than in the more distant past." RITA J. SIMON & JEAN LANDIS, *THE CRIMES WOMEN COMMIT, THE PUNISHMENTS THEY RECEIVE* 44-46 (1991). Simon and Landis use arrest statistics to demonstrate that "[t]he percentage of women arrested for crimes of violence does not show a marked change. Between 1963 and 1987, the percentage fluctuated only slightly, from a low of 9.5 percent in 1968 to a high of 11.1 percent in 1987." *Id.* at 46-47. See also MANN, *supra* at 15-16.

39. In their study of union violence, Thieblot and Haggard postulated:

Some industries, because of the nature of the work involved in them, are more physical than others. Construction work, for example, is more physical than retail selling. It seems reasonable to assume that the more physical industries attract stronger and generally rougher

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studies on women's roles in strikes; as well as evidence presented in this study, indicate that women have not suddenly been masculinized by social, political, and demographic changes in the 1970s. Rather, women, like men, have long engaged in a wide range of behaviors on the picket line including violent behavior generally typified as "masculine."⁴⁰ Women sometimes used baseball bats, tire irons, and occasionally guns. This violent "masculine" behavior may have been hidden because of women's smaller numbers as well as a tendency to ignore and discount behaviors that appear anomalous.

Historically women have also "feminized" the picket line by bringing to it objects and styles of behavior that are linked to the separate sphere of women. For weapons, women have used bread loaves, hat pins, handbags, and umbrellas.⁴¹ In mining towns, young women have teased the National Guardsmen standing watch outside the mines.⁴² In the 1910s and 1920s, telephone operators (by then all female) would dress up in their best finery — "fur coats, high heels, and fashionable headgear" — and engage in "spirited picketing, parades, singing and dancing, and frenzied mass meetings."⁴³ Also, in more recent strike cases, women engaged in singing, chanting, and dancing. They used the implements at hand for weapons, including purses. Women have brought their young children to the picket line.⁴⁴ In a few instances, women have

employees, who might be expected to participate more easily in acts of violence during strikes.

THIEBLOT & HAGGARD, *supra* note 1, at 58-59. They concede that, based on their data, "this is not always the case." *Id.* at 59.

40. This fact was dramatically depicted in a photograph recently published in The Buffalo News. The photo, taken during a Bell Aircraft strike in Buffalo in 1949, shows "a baseball bat-wielding woman wearing an army helmet . . . about to crush the fedora being worn by a replacement worker entering the . . . plant." Joseph P. Ritz, *Modern Parallels Seen in Strike at Old Bell Aircraft, Caterpillar*, BUFFALO NEWS, April 11, 1992, at A7, col. 2.

41. The characterization of umbrellas as feminine is underscored by the following observation: "Army and Marine Corps men are not allowed to use umbrellas while in uniform, although women in all the services are. . . . According to a third hand newspaper account, umbrella use by men was vetoed because senior officers thought the practice 'too wimpy.'" WILLIAMS, *supra* note 37, at 47-48.

42. Hall, *supra* note 12, at 366-67.

43. STEPHEN H. NORWOOD, LABOR'S FLAMING YOUTH: TELEPHONE OPERATORS AND WORKER MILITANCY, 1878-1923, at 12, 8 (1990).

44. In one study of a 1979 strike by women clerical workers, a striker commented that "'management resented [women bringing their children to the picket line] because it made them look bad.'" Cynthia B. Costello, *Women Workers and Collective Action: A Case Study from the Insurance Industry*, in WOMEN AND THE POLITICS OF EMPOWERMENT 126 (Ann

"feminized" traditional male behavior by "capturing" symbolic male weapons — by filling a squirt gun with perfume and "shooting" strike-breakers — or mimicking male "pranks" — by spraying perfume or throwing coffee or ice tea on strike-breakers (rather than spraying skunk oil or throwing paint).

There is intriguing evidence that women have begun to capture "male" language, especially sexual language which is generally used to objectify, demean, abuse, and threaten women. It could be argued that this is evidence of their "masculinization," "that as women are liberated and assume traditional male social roles, they begin to assert themselves in typically male ways."⁴⁵ Also, the "opportunity" thesis might predict that as more women enter the workforce and participate in union activity, the more opportunities they will have to engage in violent picket line behaviors supposedly typical of men.⁴⁶ But some of the cases do not fit neatly into either the "masculinization" or "opportunity" theses.

For example, a panel of arbitrators described an encounter between a striking female flight attendant and several female strike replacements as follows: "While walking up the corridor, the Grievant hurled invective upon opprobrium at the three strike replacement flight attendants. Continuously, she shouted, 'scabs,' 'Icahn whores,' and 'cunt' in full view of the patrons of the airport."⁴⁷ This striker's use of language is not only not "feminine," it is degrading to women. But it also is not expected from an employee socialized to the occupational status of a flight attendant — traditionally a female role.⁴⁸ Other cases from the

Bookman & Sandra Morgen eds., 1988).

45. SIMON & LANDIS, *supra* note 38, at 2.

46. See generally *id.* at 3-9. The "opportunity thesis" posits that women's "objective locations within the social structure and particularly within the occupational sphere, as well as in the private family sphere, . . . influence[s] the nature of their criminality." *Id.* at 3.

47. Trans World Airlines, Inc., 1989 BNA Unp. Lab. Arb. LEXIS 3330. The grievant in this case was reinstated because of procedural irregularities in the employer's handling of the case. The arbitrators made no independent findings of fact, but adopted the facts as stated in the employer's brief. These "facts" were paraphrased in the arbitrators' opinion.

Although most of my cases have been drawn from published arbitration and Board decisions, I have included in my database the "unpublished" arbitration decisions that are available in the LEXIS computer database. Although these are not published in printed and bound form, they are "published" in the sense that they are widely available to arbitrators who have access to LEXIS.

48. In fact, until the practice was found to be in violation of Title VII of the Civil Rights Act, flight attendant positions in some airlines were open exclusively to women. See *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971). Pan American presented evidence at trial that "[t]he performance of female attendants was *better* [than male's] in the sense that they were *superior* in such non-mechanical aspects of the job as 'providing reassurance to anxious passengers, giving courteous personalized service, and in general,

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1950s (before "women's liberation") indicate similar use of "street" language by women in both traditionally female and traditionally male occupations, but the use of such language is more prevalent in recent cases.

In one intriguing Board case, a group of lesbian strikers adopted, and were disciplined for, their use of "male" language. The events occurred in a 1980 strike of bus drivers working for Aztec Bus Lines in Los Angeles. A group of very active and vocal strikers on the picket line were openly-declared lesbians. The women used their sexuality to parody sex roles and sexual language as a picket line tactic intended to offend, embarrass, and harass supervisors and strike-breakers as they crossed the picket line. They shouted sexual taunts and chants and made obscene gestures toward both women and men.⁴⁹

This group of women defied both expected female sexual roles as well as expected "feminine" behavioral norms. The irony is that when women want to use sexual language and sexual innuendo as a picket line tactic to offend men and other women, they must appropriate the "locker room" language and "street talk" of men. This is language that might be expected from women who are prostitutes, not women who drive city buses or school buses. This particular case of the lesbian strikers, like the case of the flight attendant, marks a departure from prior types of picket line behavior by women. The fact that the bus drivers formed a cohesive, identifiable subgroup within a large company, at a time when general

making flights as pleasurable as possible within the limitations imposed by aircraft operations." *Id.* at 387 (emphasis in original). Furthermore, the trial court found that "Pan Am's passengers overwhelmingly preferred to be served by female stewardesses" and that psychiatric evidence demonstrated that passengers' "psychological needs are better attended to by females." *Id.*

49. For example, one striker called a female supervisor "meat" and "cocksucker," and "turned her posterior to [her male boss], and stated 'Kiss my ass.'" Aztec Bus Lines, Inc., 289 N.L.R.B. 1021 (1988), ALJ Decision, 1988 WL 214305, at *80 (N.L.R.B.). The ALJ found that "[w]hile mere foul and vile language is not generally disqualifying, in this case, I hold that the repeated and repulsive nature of the remarks directed [at the female supervisor], together with the blocking and other petty acts of harassment, make [the complainant] unfit for reinstatement." *Id.* The Board reinstated her because the employer had failed to "evenhandedly" discipline nonstrikers engaged in similar or more serious conduct. *Id.*, 1988 WL 214305, at *11-12 (N.L.R.B.).

Another female striker called the company president "a motherfucker" and "referred to eating [a female supervisor's] pussy, finger fucking, [that the supervisor] is licking [the male company president], and was [he, the president] fucking all the women." Aztec Bus Lines, 1988 WL 214305, at *83 (N.L.R.B.). The ALJ observed that "still another member of the female chanters . . . distinguished herself, in [the company president's] mind, by exceeding even the low standards of sexual language set by some of the other strikers." *Id.* The ALJ denied reinstatement in 1982, but the Board reinstated her in 1988.

societal attitudes about homosexuality were beginning to come under attack, undoubtedly facilitated their willingness to use "male" language to play on the ambiguities of their sex roles and gender roles.

B. How Is Conduct Described?

Gender assumptions underlie many of the terms which arbitrators and judges use to describe the picket line behavior of strikers, as well as the selection of "relevant" facts. Gender can affect the way a case is perceived and described. In other words: What is put in? What is left out? For example, in 1986 the First Circuit Court of Appeals upheld an NLRB decision which denied reinstatement to six striking female nurses. The court provided "capsulized descriptions" of the nurses' behavior to show that the Board decision could "in no way be characterized as arbitrary, unreasonable or capricious."⁵⁰ The distillation of facts — the way the court used the record to describe the behavior of one of the nurses who was discharged — provides clues to how the court perceived the problem. The court wrote:

She interfered with the efforts of a non-striking nurse to enter the premises by blocking the way and jockeying her body to attempt to keep the nurse out. Finally she grabbed the nurse and shook her. At a later time, while wearing heavy boots, she kicked the side of a car . . . damaging [it]. She also kicked and damaged another car . . .⁵¹

This nurse engaged in acts that were "violent" but hardly extreme, and certainly not unusual in heated labor disputes. I do not think the discharge of this woman was upheld by the court because she violated norms of picket line behavior, but rather because her behavior was "improper" for a woman and particularly for a nurse. The damage she caused to automobiles and the feelings and bodily integrity of nonstriking workers was minimal, but the assault on the bounds of propriety was serious. She used her body by "jockeying" it — a term with male connotations — to keep a nonstriking nurse from entering the clinic. When this failed to discourage the strike-breaker, she "grabbed" and "shook" her. Although women may grab and shake their children, to get their attention or punish them, women violate stereotypical female behavior when they grab and shake other adults. Also, the court noted

50. NLRB v. Preterm, Inc., 784 F.2d 426, 430 (1st Cir. 1986).

51. *Id.*

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that she kicked two cars "while wearing heavy boots." Presumably if she had been wearing appropriate feminine footwear she would not have been able to kick and damage the car without also injuring herself. Her footwear was anomalous and, therefore, notable.⁵²

C. How Are "Harm" and "Deviance" Defined?

Arbitrators and judges may conceive harm very differently depending on the sex of the victim and the perpetrator. Sometimes the witnesses bring their own gendered values into the stories they tell, but the decision-makers also recast those stories through their own gendered visions. There are numerous examples of this phenomenon in my study. Female victims are sometimes assumed to be seriously harmed if their personal grooming is affected — hairdos disturbed, fingernails broken, clothing soiled or ruined. There is a tendency to protect women more than men from physical and verbal assaults — particularly if the victims are strike-breakers — because of the presumed natural timidity and fear such women must experience when crossing a picket line. A male strike-breaker who fits the stereotype of the "wimp" or the "97-pound weakling who wears glasses" is also seen as deserving special protection from violent strikers.

The text from a 1956 arbitration decision⁵³ from the massive Southern Bell strike provides several examples of the different ways harm is understood and described depending on the sex of the parties. The female grievant admitted calling a female strike-breaker a "dirty low down son-of-a-bitch." The arbitrator found this language "vile," and observed that the victim was a "rather quiet, shy type of person." On the other hand, when a male strike-breaker testified that a male striker said, "You son-of-a-bitch, . . . I'll whip your ass right now," (which the striker denied), the arbitrator found that the "more nearly correct version of what was said" was that the striker "did not curse" at all.⁵⁴

Both the male striker and the female striker were involved in physical "scuffles" with same sex opponents. The behavior of each was different in ways that might be linked to stereotypical gender roles. The female striker allegedly kicked or tripped the other woman who, the arbitrator noted, was "employed in the daytime as a beauty parlor operator." Almost simultaneously, a second female striker hit the strike-

52. *Id.*

53. Southern Bell Telephone & Telegraph Co., 25 Lab. Arb. (BNA) 767 (1956) (Schedler, Arb.).

54. *Id.* at 768.

breaker with "a purse or handbag." The victim hit back and chased the second striker, "grabbed her by the back of the coat and threw her to the pavement," where the "two women were prone on the sidewalk pulling one another's hair."⁵⁵

The arbitrator observed that, though they did not need medical attention, the two women each received bruises and scrapes, and one "broke three fingernails," while the other woman's "hairdo was badly ruffled." Both strikers were discharged for their misconduct, and the arbitrator reduced this to four weeks suspension because he believed "some punishment is justified on the principle that it will serve as a deterrent to those who might engage in similar activities in the future."⁵⁶

The two male strikers in the same case apparently required less deterrence for engaging in similar conduct: the arbitrator reduced their discharges to only a one week suspension.⁵⁷ But despite apparent similarities in the behavior and extent of harm in the two separate incidents, the men were distinguished from their female counterparts, and their conduct was described in strikingly different terminology.

The male strikers, who were "combatants" engaged in an "affray," also picked on a lone, same-sex strike-breaker — the male driver of a car leaving the company's parking lot. The arbitrator described the driver as "strong and well-built." In fact, he was "stronger and huskier" than the first striker who had supposedly cursed at him and challenged him to a fight. When the driver got out of his car, he "assum[ed] a fighting stance," and the striker began "dancing or scuffling around with his fists held up in the manner of a fighter." The striker then "threw a glancing blow" at the driver, who "retaliated." And, though "blows may have been struck simultaneously," neither man "struck a firm blow." The arbitrator believed that "[t]heir gestures were more menacing than real."⁵⁸

About the same time, the second striker "hit the driver with his fist just above the left eyebrow, causing a small piece of skin to peel off." Again, no one required medical attention. Because the arbitrator was uncertain who was the "aggressor," and assumed that the ("strong" and "husky") driver may have "stopped looking for trouble," the grievants were given only a one week suspension. The arbitrator noted that the "[d]ecisions have almost uniformly held that slight skirmishes of this kind are not uncommon on a picket line and they do not warrant discharge."⁵⁹

55. *Id.* at 768-69.

56. *Id.* at 769.

57. *Id.* at 771.

58. *Id.* at 770-71.

59. *Id.*

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D. *How is Truth Determined?*

As demonstrated by the *Southern Bell* case, it is not uncommon for arbitrators and judges to refer to the height, weight, and apparent physical fitness of parties in making assumptions about who was the aggressor in a particular violent incident. Often these descriptions emphasize stereotypical masculine and feminine physical traits and draw conclusions about personality traits such as aggressiveness and passivity from the observable physical traits. This type of decision-making in part follows the highly controversial reasoning of sociobiologists that innate, often gender-specific, biological traits and genetic endowments determine complex social behaviors.⁶⁰

Sometimes as important as (and often linked to) biological traits is gender-typed occupational or skill training which might support assumptions about motives and behavior. The cases contain several examples indicating that a man's training in the army, as a boxer, or a football player can lead an arbitrator or judge to conclude that either the striker or the opponent (often a strike-breaker) is prone to violence,⁶¹ or trained to respond instinctively to confrontation (so it is not really his fault), or is so thoroughly trained in martial arts that he was only play-acting — going through the motions with no intent to injure the other party. Conversely, for example, a man who had training as a minister outside of work was treated favorably because his violent behavior was seen as uncharacteristic and not likely to occur again.

Following are two examples of the way gender-linked background characteristics are used by decision-makers to construct and then evaluate the "truth" of what happened on the picket line. In an early 1948 arbitration decision in the meatpacking industry,⁶² the arbitrator implicitly accepted the male grievant's explanation for why he threw a railroad lantern at a foreman's car as it entered the plant gates. The foreman had testified that the grievant, Olson, came to his home two days after the incident and said:

60. See, e.g., DAVID BARASH, *THE WHISPERINGS WITHIN: EVOLUTION AND THE ORIGIN OF HUMAN NATURE* (1979); EDWARD O. WILSON, *SOCIOBIOLOGY: THE NEW SYNTHESIS* (1975).

61. For example, a male employee, discharged for using threatening and obscene language in an argument with a strike-breaker, was reinstated because the arbitrator found (in resolving a conflict in testimony) that "the argument and name-calling was precipitated by [the strike-breaker], who has been a football player and a boxer, and who is considerably bigger than [the employee]." *Southern Bell*, 26 Lab. Arb. (BNA) 186, 190 (1956) (McCoy, Arb.).

62. *Swift & Co.*, 12 Lab. Arb. (BNA) 108 (1948) (Healy, Arb.).

"You know when I threw that lantern at you that was due to my army training. When we received an order, we act quick. If you ever had any army training, you know that. When you came through there and drove down the road, somebody said 'Stop that hit-run son of a gun,' and . . . [t]he first thing that occurred to me was to stop the car, and I threw the lantern, just like that. I did not know that was you — I did not know that was your car."⁶³

The arbitrator ruled that Olson was not discharged for cause because "[t]he arbitrator has put himself to the test, by reflection — and he cannot say that he would behave in the logical, physically indifferent manner expected of Olson." The arbitrator in a footnote commented that "[t]he arbitrator did more than reflect. He traveled the distance referred to at a speed of 15 miles per hour. He found there would be little time for careful thought between the start of the shouts and the time the car neared Olson."⁶⁴ The arbitrator continued that, although he did not suggest forgiveness for impulsive behavior *per se*, "this type of impulsive behavior in no way damages the employment relationship or shows a willful gesture of violence to interfere with the rights of the company and its employees. The most culpable person is he who started the cry and thereby incited the mob."⁶⁵

By comparison, during the 1982 Aztec Bus Lines strike,⁶⁶ a strike-breaker drove his bus into the company yard which was being picketed by drivers and their families.⁶⁷ Mrs. Leonard — a striker's wife — was in the crowd of picketers with her two young children. In "the bedlam," as the bus entered the yard, it hit Mrs. Leonard and "several of the strikers literally went berserk." A female picket captain named Harlene "Sam" George, described as a 5-foot 3½-inches tall, 110-pound nurse who had "earned an R.N. degree and worked in pediatrics and a hospital emergency room for several years, . . . freaked out" and "went crazy" according to the witnesses. She attacked the president of the company who was standing near the pickets. She "rushed up" to the president, accusing him of being a murderer, and "threaten[ed] to kill him." She struck him "with her fists, beating him several times around

63. *Id.* at 116.

64. *Id.* at 117 n.1.

65. *Id.* at 117.

66. See *supra* text accompanying note 49.

67. Aztec Bus Lines, Inc., 289 N.L.R.B. 1021, 1988 WL 214305, at *69 (N.L.R.B.).

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the neck and chest." He was "only slightly injured, if at all, from this attack." A union official had to pull her away from him.⁶⁸

The administrative law judge found this a "close case," but reinstated Harlene George with back pay. "In part," he explained, "her actions were the result of hysteria caused by lack of sleep and the warm temperatures, and the animal exuberance of the strike." The judge further rationalized his decision to find her discharge an unfair labor practice and to order reinstatement by noting that:

[Her] striking [the president] was impulsive and of minor consequence. The impulsive nature of the act is shown by [her] training and experience as a nurse which under normal circumstances would have instinctively caused her to attend to Mrs. Leonard, the ostensibly injured person. Instead, she attacked [the president], not even the driver of the bus involved in the accident.⁶⁹

The decision-maker's construction of the relationship between gender, job training, and impulsive behavior can be compared in these two very similar "hit-and-run" cases. Olson, the male in the first case, was acting consistently with his military training when he responded to an ostensible hit-and-run incident by smashing his lantern into the foreman's car. George, the petite female in the second case, was out of control and hysterical, acting contrary to her nursing training, when she physically assaulted the president in response to the bus driver running down a woman on the picket line. Furthermore, in the first case, the male arbitrator not only accepted the grievant's version of events, but after reenacting the incident, the arbitrator agreed he would have acted the same way in that situation. The grievant's impulsive behavior had a logic to it. In the second case, the male judge ultimately adopted a paternalistic attitude, accepting the witnesses' characterizations that George "went crazy" as evidence of her "hysteria." Her impulsive behavior, however, was illogical and mystifying to the judge — indeed, she hit the "wrong" person.⁷⁰

The arbitrators in this study are virtually all male and there are only a few female administrative law judges in the sample.⁷¹ Although I

68. *Id.*

69. *Id.* at * 70.

70. *Id.*

71. Over the years covered by this study, there have been several female members of the NLRB.

suspect that both male and female decision-makers are likely to bring similar gendered cultural assumptions to their treatment of strike misconduct cases, it is understandable that arbitrators and judges simply have an easier time stepping into the shoes of same sex persons. This ability to empathize with strikers and other witnesses affects which stories are believed and which justifications are accepted.

For example, arbitrators and administrative law judges (ALJs) sometimes make gendered assumptions about how men or women will behave during a strike in the presence of the opposite sex, both on and off the picket line. In another 1982 ALJ decision, the administrative law judge — this time a female — did not credit the testimony of one man that a male striker had threatened him in front of the two men's wives. One reason given for this credibility determination was the "inherent improbability of [the striker] making threats in front of [his own] wife and in the presence of the wife of the individual ostensibly threatened."⁷² The disputants in this particular case were Hispanic, as were most of the employees in the strike. The judge's construction of reality here may have reflected her understanding of the dichotomous and stereotyped gender roles and codes of behavior which she perceived to be typical of the Hispanic culture of Southern California, the locus of the dispute. But she also may have found it difficult to imagine the men in her private life making threats to each other in front of their wives in such a way. Thus, gendered cultural assumptions and gender identity serve to constrain and shape both the evidence and the outcomes of the cases.

E. What are the Standards of Conduct?

Arbitrators and judges often seem to assume that some level of picket line violence is an acceptable expression of unrestrained male aggression and physicality. In part, this assumption cloaks the causes of labor violence behind a theory of biological determinism. In particular, when assumptions about the "animal exuberance"⁷³ of male workers are used to defend and rationalize a tolerance for a minimal level of violent behavior in the "rough and tumble"⁷⁴ of labor activity, women's violence becomes inexplicable, deviant, and mysterious.

In the same way that women have been traditionally assumed to be biologically unfit for certain occupations, they are assumed to be

72. *Champ Corp.*, 291 N.L.R.B. 803, 1988 WL 214239, at *27 (N.L.R.B.).

73. *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941).

74. *NLRB v. Local 1229, IBEW (Jefferson Standard)*, 346 U.S. 464, 480 (1953).

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biologically predisposed to passivity. Popular conceptions about male hormones and their relation to aggression have reinforced the cultural imagery.⁷⁵ Psychologist K. E. Moyer notes that "[it] has been known for centuries . . . that one can take the raging bull and convert it into a gentle steer by the operation of castration which reduces the level of testosterone [the principal male hormone] in the blood stream."⁷⁶

The confluence of the streams of biological determinism and cultural expectations have always been present in the law of labor picketing. Male workers have been expected to be "raging bulls" whose aggressive tendencies need to be channeled, controlled, and at times, oppressed. That strong, able-bodied men should, on occasion, express their anger in violent form is understood as natural. That female workers, the "gentle steers," should become "raging bulls" on the picket line defies all the norms of biology, culture, and society. A violent woman is "mad" or "hysterical." Her behavior is a symptom of pathology.⁷⁷

Arbitrators and judges frequently use the term "animal exuberance" in their analysis to label conduct which is somewhat violent, but is not serious enough to justify discharge or a lengthy suspension. The term has since been used so often and in such different contexts that it is clear that the expression has no precise meaning, but rather a range of meanings. It appears the term, with its explicit biological referent, connotes momentary, instinctive acts of male aggression — acts driven by male hormones and primal, lower-order responses which, some sociobiologists have argued, link human behavior to animal behavior. Thus "boys will be boys," and one must recognize and excuse the fact that they cannot always control their impulsive but "harmless" acts. Yet, the term has been applied to female employees as well, possibly with the implicit assumption that women's hormonal swings cause them to behave in erratic, emotional, impulsive ways.

In addition to the apparent biological connotations of "animal exuberance" is the connotation of social class, with the underlying notion that the hierarchy of the animal world reflects the hierarchy of the social classes. One can be fairly certain that Justice Frankfurter had social class in mind when he applied the term to "[p]eaceful picketing [which] is the

75. See, e.g., FAUSTO-STERLING, *supra* note 34 at 23-54 (discussing and critiquing the popular ideas and scientific studies about the relationship between hormones and aggression).

76. K.E. MOYER, VIOLENCE AND AGGRESSION: A PHYSIOLOGICAL PERSPECTIVE 43 (1987). Moyer reports that in 1894 a Kansas doctor first used castration as a method of dealing with violent sex crimes. *Id.* at 45.

77. See FAUSTO-STERLING, *supra* note 34, at 4-5, 90-110 (discussing the relation between "Premenstrual Syndrome" (PMS) and female behavior).

workingman's means of communication."⁷⁸ It was assumed that workingmen in particular were likely to engage in rough forms of discourse and occasional physical violence to resolve disputes. In this sense, class and gender assumptions are interrelated.

The only constant in all the decisions is that the expression "animal exuberance" is almost always applied to violent behavior and threatening language which the arbitrators or judges consider, for a variety of reasons, as not warranting severe punishment, particularly discharge. In fact, it may be that the term has lost some of its original connotations, and is now used as a term of art or a convenient label to distinguish acceptable from intolerable behavior.

Cultural standards of behavior are often different for men and women. For example, the ALJ in the 1982 *Aztec Bus Lines* case had found the explicitly sexual — but stereotypically "male" — language of the lesbian strikers to be so "repulsive," "foul," and "vile" that it warranted discharge.⁷⁹ Nevertheless he applied a very different standard to a male striker. The 57-year-old man "mistook a female customer of Aztec for a new job applicant" and shouted at her as she crossed the picket line, "You cocksuckers are taking our jobs away from us and we'll get you."⁸⁰ He "frequently" called the company president a "prick."⁸¹ The arbitrator found the striker's "ill-advised name calling a relic of his former career in the Navy from which he is now retired. None of his activities are serious enough to preclude his reinstatement . . . with back pay."⁸²

IV. CONCLUSION

It is important to acknowledge that women have exhibited militant, aggressive, sometimes violent and destructive behavior on the picket line, in addition to bringing to collective action other more peaceful tactics. Women workers who picket have historically been either ignored, ridiculed, or demeaned. Today, although their presence on the picket line

78. *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941).

79. See *supra* note 49 and accompanying text.

80. *Aztec Bus Lines, Inc.*, 289 N.L.R.B. 1021, 1988 WL 214305, at *78 (N.L.R.B.).

81. *Id.*

82. *Id.* at *79. This example demonstrates the inherent ambiguity of cultural constructs. Another person could easily assume that — because Navy training and protocol require that military personnel exercise restraint and decorum in the presence of authority figures, especially commanding officers — a former "Navy man" should be held to a higher standard of conduct than other strikers.

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is more accepted than in the past, their behavior is still bounded by unwritten rules that are not always applied to men in the same way. Women who engage in "typically male" acts of picket line violence may be punished doubly: for violating the boundary between peaceful and violent picketing and for violating the boundary between female and male behavior. Despite many changes in women's "rights" in the workplace, arbitrators and judges continue to use gender roles and gender identity in the construction of the law of strikes. They have not used the facts of women's participation in labor activity — including labor violence — to demythologize the laws governing collective action — for either men or women.

